Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

April 3, 1998

Ms. Linda Wiegman
Supervising Attorney
Office of General Counsel
Texas Department of Health
1100 West 49th Street
Austin, Texas 78756-3199

OR98-0886

Dear Ms. Wiegman:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID#s 114192 and 114419.

The Texas Department of Health (the "department") received two related requests for information concerning Columbia Navarro Regional Hospital. You claim that the requested information is excepted from disclosure under section 552.101 in conjunction with various statutes, common-law and constitutional privacy, and the informer's privilege. We have considered the exception you claim and reviewed the submitted information.

Sections 552.301 and 552.302 require a governmental body to release requested information or to request a decision from the attorney general within ten business days of receiving a request for information the governmental body wishes to withhold. When a governmental body fails to request a decision within ten business days of receiving a request for information, the information at issue is presumed public. *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.--Austin 1990, no writ); *City of Houston v. Houston Chronicle Publ'g Co.*, 673 S.W.2d 316, 323 (Tex. App.--Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). The governmental body must show a compelling interest to withhold the information to overcome this presumption. *See, e.g.*, Open Records Decision No. 150 (1977) (presumption of openness overcome by showing that information is made confidential by another source of law or affects third party interests).

The department received the requests for information on January 14, 1998, and January 19, 1998. You requested decisions from this office on February 2, 1998, and February 10, 1998, respectively. Consequently, you failed to request a decision regarding each of these requests within the ten business days required by section 552.301(a) of the

Government Code. Thus, as you assert that the requested information is made confidential by other laws, we will examine whether the documents at issue are public and must be disclosed.[1]

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 of the Government Code encompasses common-law and constitutional privacy. Information may be withheld under section 552.101 in conjunction with the common-law right to privacy if the information contains highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person and if the information is of no legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). This office has determined that common-law privacy protects certain financial information, including information about personal financial decisions. *See* Open Records Decision No. 600 (1992) at 9-12. In the instant case, we do not believe that any of the information is protected by common-law privacy. Therefore, section 552.101 does not except the requested information from required public disclosure.

Section 552.101 also encompasses information protected by other law. We observe that some of the submitted information consists of federal HCFA 2567 statements of deficiencies and plans of correction of the mental health facility which were prepared for purposes of a Medicare or Medicaid complaint investigation survey. Federal regulations require the department to release the HCFA 2567 statements of deficiencies and plans of correction, provided that (1) no information identifying individual patients, physicians, other medical practitioners, or other individuals shall be disclosed, and (2) the provider whose performance is being evaluated has had a reasonable opportunity to review the report and to offer comments. *See* 42 C.F.R. §§ 401.126, .133; Open Records Decision No. 487 (1988) at 5. As the reports are signed by a provider representative and the "provider's plan of correction" portion of the report appears to contain the provider's comments to the report, we believe the provider has had a reasonable opportunity to review and comment on the report. Accordingly, you must release these reports, but with deletions of information that identifies the persons specified in the regulation.

In addition, you ask whether information in the HCFA 2567 forms obtained from medical records must be withheld pursuant to state laws. You ask whether a patient's diagnosis or medical condition specifically identifies the patient to a certain extent, and thus ask whether the medical information should be redacted from the HCFA 2567 forms. As we

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[1]A claim under the informer's privilege may be waived by the governmental body since the privilege belongs to the government. *See* Open Records Decision No. 549 (1990) at 6. We conclude that the informer's privilege is not a compelling exception in this instance and, therefore, may not be used to withhold any of the requested information from required public disclosure under section 552.101. We note that you withdrew your assertion of the informer's privilege by your February 5, 1998, letter to this office.

have concluded in several previous rulings to the department, we believe that federal law requires the department to release de-identified HCFA 2567 documents. *See* Open Records Letter Nos. 97-2843 (1997), 97-1514 (1997), 97-1492 (1997), 97-1472 (1997), 97-1388 (1997), 97-1230 (1997). In most instances, we do not believe that a patient's medical condition or diagnosis identifies that patient when the name is redacted from the HCFA 2567 forms. As federal provisions govern the public disclosure of the HCFA 2567 forms, we believe that the federal law prevails to the extent it may conflict with, for example, the Texas Medical Practice Act and chapter 611 of the Health and Safety Code regarding information obtained from medical and mental health records. *See English v. General Electric Co.*, 110 S.Ct. 2270, 2275 (1990) (state law preempted to extent it actually conflicts with federal law). Furthermore, we believe the de-identification required by federal law is sufficient to protect the privacy interests of the patients.

Subchapter G of Chapter 241 of the Health and Safety Code provides for the disclosure of health care information in the possession of hospitals. Section 241.152(a) of the Health and Safety Code provides that "a hospital or an agent or employee of a hospital may not disclose health care information about a patient to any person other than the patient without the written authorization of the patient or the patient's legally authorized representative." "Health care information" means "information recorded in any form or medium that identifies a patient and relates to the history, diagnosis, treatment, or prognosis of a patient." Health & Safety Code § 241.151(1). Section 241.153(3) provides several instances in which a patient's health care information may be disclosed without the patient's written authorization. One such instance is if the disclosure is to "a federal, state, or local government agency or authority to the extent authorized or required by law." *Id.* § 241.153.(3). There is no provision which addresses the re-release of the health care information by the department. Therefore, we do not believe that section 241.152 is applicable in this instance. You may not withhold any information under section 241.152 of the Health and Safety Code.

Finally, you claim that some of the submitted information was obtained from medical records, and is thus confidential under the Medical Practice Act. Section 5.08 of the Medical Practice Act, V.T.C.S. article 4495b (the "MPA"), provides:

> (a) Communications between one licensed to practice medicine, relative to or in connection with any professional services as a physician to a patient, is confidential and privileged and may not be disclosed except as provided in this section.
>
> (b) Records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician are confidential and privileged and may not be disclosed except as provided in this section.

In addition, section 5.08(j)(3) provides for further release of confidential medical records obtained with a valid consent for release only if the disclosure "is consistent with the authorized purposes for which consent to release the information was obtained." *See also* V.T.C.S. art. 4495b, § 5.08(c).[2] We have reviewed the information submitted to this office. We agree that some of the medical records come within the purview of the MPA and have marked the documents accordingly.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,

Vickie Prehoditch
Assistant Attorney General
Open Records Division

VDP/glg

Ref.: ID#s 114192 and 114419

Enclosures: Submitted documents

cc: Mr. Darren Victory
Corsicana Daily Sun
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(w/o enclosures)

[2]We note that one of the requestors is the subject of the medical records. Therefore, if this requestor has complied with the access provisions of the MPA, the department may not withhold the medical records under section 552.101 of the Government Code.

bcc: Mr. Forest Lee Calhoun
4100 S. Highway 287
Corsicana, Texas 75110
(w/o enclosures)